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NOTE

INDEPENDENT CONTRACTOR IN SOUTH CAROLINA

INTRODUCTION

It would be folly to attempt to set forth the entire body of the law of independent contractors on these few pages. Therefore, this note is confined to a presentation of the broad principles of this field of the law and to a humble attempt to bring together and analyze the decided cases in South Carolina in relation to these principles. In short, this is an effort to determine the status of the independent contractor in South Carolina and does not purport to deal with all phases of the law.

GENERAL DEFINITIONS

It is fitting to begin with the general definition of the term "independent contractor" although it is not capable of exact definition. There are many definitions which for the most part follow a general pattern, but perhaps the most quoted and often used is, that:

An independent contractor is one, who, exercising an independent employment, contracts to do certain work according to his own methods, and without being subject to the control of his employer, except as to the product or result of his work.¹

Another good definition which substantially follows this one is:

The independent contractor is one who exercises some independent employment, in the course of which he undertakes, supplying his own materials, servants and equipment, to accomplish a certain result, not being subject while doing so to the direction and control of his employer, but being responsible to him for the end to be

1. 27 Am. Jur. 481; 14 R. C. L. 67 — Definitions collected — BLACK'S LAW DICTIONARY (3rd Ed. 1933); BOUVIER'S LAW DICTIONARY (8th Ed. 1915). See Note: 19 A. L. R. 226.

achieved rather than for the means by which he accomplishes it.²

Any further definitions would be mere repetition and those above are sufficient for the purposes of this article.

INDEPENDENT CONTRACTOR DISTINGUISHED FROM SERVANTS AND AGENTS GENERALLY

The law of independent contractors is part of the much greater field of the law of agency. Therefore, it is necessary to distinguish an independent contractor from both agents and servants generally before giving closer scrutiny to the independent contractor himself.

"The word 'servant' is used in contrast with 'independent contractor', a term which includes all persons who contract to do something for another and who are not servants with respect thereto. An agent who is not a servant is, therefore, an independent contractor when he contracts to act on account of the principal."³

"Agent" is a word used to describe a person authorized by another to act on his account and under his control. An agent may be one who, to distinguish him from a servant in determining the liability of the principal, is called an independent contractor. Thus, the attorney at law, the broker, the factor, the auctioneer, and other similar persons employed either for a single transaction or for a series of transactions are agents, although, as to their physical activities, they are independent contractors.⁴ Of the two, servants and agents, the agent more nearly corresponds to the independent contractor than does the servant but they are both distinguishable mainly on the grounds of control.⁵ It is not necessary to delve deeper into the distinction between servants and agents and for the sake of brevity and clarity, they will both be referred to as "agents" as distinguished from "independent contractors" in the following discussion.

2. 1 MECHAM, AGENCY, § 40 (2nd Ed. 1914).

3. RESTATEMENT, AGENCY, § 2 comment A (1933).

4. Id., § 2 comment (d).

5. 2 Am. Jur 17; 14 R. C. L. 67; see Note: 19 A. L. R. 253, 2 C. J. S. 1027.

FACTORS TO BE CONSIDERED

The legal literature about the independent contractor has been occupied, almost exclusively, with the question of how best to identify him.⁶ To determine just who he is, we must of necessity establish some guides or factors to be considered in ascertaining him. The authorities are not wanting in this respect and have set forth a myriad of criteria. In determining the relationship of the employer and independent contractor, the following matters of fact, among others, are to be considered: "1. The extent of control which, by the agreement, the master may exercise over the details of the work; 2. Whether or not the one employed is engaged in a distinct occupation or business; 3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; 4. The skill required in the particular occupation; 5. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; 6. The length of time for which the person is employed; 7. The method of payment, whether by time or by the job; 8. Whether or not the work is a part of the regular business of the employer; 9. Whether or not the parties believe they are creating the relationship of master and servant."⁷ Other factors to be considered are the power to terminate the relationship,⁸ control of the contractor's servants,⁹ by whom the contractor's servants are paid,¹⁰ and so on *ad infinitum*. Perhaps a short discussion of the more important of these factors or criteria would be in order at this point of the discussion.

Control—Control might well be deemed the prime factor to be considered in determining the relationship of employer and independent contractor. In fact, the theory underlying the doctrine of the non-liability of an employer for the acts of independent contractor is that a person ought not to answer for the conduct of another over whom he has no control. An examination of any case involving the law of independent

6. Steffen, *Independent Contractor and the Good Life*, 2 *UNI. OF CHI. L. REV.* 501 (1935).

7. *RESTATEMENT, AGENCY*, § 220 (1933).

8. 56 C. J. S. 56.

9. *Id.* at 57.

10. 27 *Am. Jur.* 497.

contractors will reveal a discussion of control at one point or another. It is important to realize that it matters not whether the employer exercised actual control over the conduct of the work if he has the *right* to control.¹¹ Of course, some amount of control is reserved to the employer, but the whole question in determining the relationship is a matter of *degree*. A reference to the general definition of an independent contractor reveals that the employer has control of the result but not of the means of performance. Mere supervision or right of inspection does not necessarily change the relationship to that of principal and agent where the means of performance are within the control of the contractor.¹² Other aspects of the factor of control, other than those concerning work and control of the means of performance of it, are control of the premises where the work is being done, the right to alter the plans, control of the contractor's workmen, and others which may be incorporated generally with those just mentioned.¹³

Independent Calling or Employment—The mere fact that one is engaged in a separate and independent employment is not conclusive that he is an independent contractor. However, it does have some weight for persons in some particular occupations are naturally regarded as being independent. Furthermore, persons in business for themselves, or owning their own businesses, are less likely to be the agents or servants of another than those persons who have no particular calling or occupation, but who merely do what they can when they can, and for whom they can.

"An examination of what part of the world's work he performs daily is revealing. He has been busy. He is the builder, the broker, the stevedore, the hostler, the architect, the warehouseman; he paints your house, he repairs your automobile, your windows, handles your collections, sells your real estate, procures your divorce, and so on *ad infinitum*. He is the small businessman incarnate, the last stubborn refuge of rugged individualism."¹⁴

Skill—The skill required in the particular occupation is an important factor, and one closely related to the factor just dis-

11. Notes: 65 L. R. A. 448, 490; 75 A. L. R. 725; 19 ANN. CAS. 10.

12. See note 11, *supra*.

13. 14 R. C. L. 65; Note: 20 A. L. R. 684.

14. See note 11, *supra*; 27 Am. Jur. 498.

15. Notes: 17 L. R. A. (N. S.) 380; 19 A. L. R. 226.

16. See note 6, *supra*.

cussed. Although the skill one possesses is not conclusive that he is an independent contractor, it is persuasive. It tends to show that one does have an independent calling, or in any event, could exercise an independent employment. In many instances, however, this factor is wholly disregarded.¹⁷

Furnishing Workmen or Materials—Again, not decisive, but worthy of consideration, is the question of who furnishes the workmen or materials. Generally speaking, independent contractors furnish the means for the doing of the work, while agents or servants use the means afforded by the master.¹⁸ However, one may still be an independent contractor when he has control of the conduct of the work, although an employer furnishes and pays certain workmen or certain materials and tools.¹⁹

Mode and Time of Payment—This is still another important, but not controlling factor. Whether the compensation is by the day, in a lump sum, or on a commission basis, is not, of itself, a material factor.²⁰ Several circumstances tending to indicate the relationship are, generally: where one contracts to perform certain work as a whole for a specified sum,²¹ where the remuneration to the person performing the work is computed on the basis of the quantity of work performed by him,²² where the remuneration is computed in reference to the amount which he himself must expend in performing the work contracted for.²³

Although only five factors or criteria or tests of those previously listed have been expanded or elaborated upon, after a fashion, it is to be understood that these are selected as being more important, in the writer's estimation, than the remainder, and also that all set forth are not contended to be a complete and exhaustive coverage by any means. It is significant to note that not one of these factors is in itself sufficient to establish the relationship of employer—-independent contractor, but they must be used together and in a manner to "tilt the scales", so to speak. As has been frequently observed

17. Note: 20 A. L. R. 745; 27 Am. Jur. 500.

18. 14 R. C. L. 73.

19. See Notes: 65 L. R. A. 507; 17 L. R. A. (N. S.) 381; 19 ANN. CAS. 20. 20 A. L. R. 755.

21. Id. at 756; Note: 6 L. R. A. 461, 505.

22. See note 20, *supra* at 726; 19 ANN. CAS. 19.

23. See note 20, *supra* at 760.

in the cases and by the authorities, no hard and fast rule can be formulated to determine the relationship, but each case must be determined on its own facts.²⁴

LIABILITY FOR THE TORTS OF THE INDIVIDUAL CONTRACTOR

The majority of cases dealing with the law of independent contractors arise out of tort. If the employer is sued and interposes the defense that the person for whose acts he is sought to be held liable for is an independent contractor; logically, the first question to be determined is whether that person is, in fact, an independent contractor, or merely an agent or servant. In the event he is found to be an independent contractor, a second question to be determined is whether the employer is, nevertheless, liable for his tortious acts. The scope of this discussion is confined to a consideration of the second question, just raised.

As a general rule, under the doctrine, respondeat superior, a master is liable for an injury to the person or property of another resulting from the acts of his servant where they are performed within the scope of his employment.²⁵ However, the doctrine of respondeat superior does not apply to the relationship of employer and independent contractor; and the general rule is that an employer is not liable for the torts of an independent contractor, or of his servants, or agents, in the performance of the work.²⁶ Several theories have been advanced on the basis of the rule but there are really but two which are generally relied upon. The first of these is that one ought not to be answerable for an injury resulting from the acts of another over whom he has no control.²⁷ The second theory upon which the rule is based is that it is in keeping with considerations of public policy.²⁸

This general rule, as most general rules in the law, has its share of qualifications and exceptions. Vicarious liability may be imposed upon the employer in certain instances and under certain sets of facts.

24. *Re Murray*, 130 Me. 181, 154 A. 352, 75 A. L. R. 720 (1931); Note: 75 A. L. R. 726.

25. 57 C. J. S. 294; RESTATEMENT, AGENCY, § 19 (1933).

26. RESTATEMENT, TORTS, § 409 (1934); II MEICHEM, AGENCY, § 1917 (1914).

27. Harper, *Torts*, § 292 (1933); Douglas, *Vicarious Liability and Administration of Risks*, 38 YALE L. J. 584 (1929).

28. Note: 18 A. L. R. 807.

Perhaps the first so called exception to the general rule of non-liability, though not so strictly an exclusive tort by the independent contractor as the personal negligence of the contractor himself, is where an incompetent or negligent contractor is employed.²⁹ That is to say, there is a duty upon the employer to exercise due care in selecting a competent contractor who will properly perform the duties or work contracted for.³⁰ There is another duty closely related with this which is to exercise reasonable care in inspecting the work after it is done or, in certain cases, during its progress, in order to see that the work is done in such a manner as to insure the safety of others.³¹ Also closely related is the proposition that even though the employer might not be liable for injuries happening during the progress of the work, he may be liable after he has assumed possession and control of the premises and the injury results from the condition in which they are maintained.³² Also, along the same reasoning as to the employer's liability being predicated upon his own personal fault, he is liable where he retains control over the work being done by the contractor or interferes with it in such a manner that the injuries to another naturally flow from such conduct.³³ Then, too, quite naturally, a ratification of the act of the contractor will render the employer liable, since, in effect, the act of the contractor becomes the act of the employer.³⁴ These situations, among others, are not really genuine exceptions, for liability is predicated on the employer's own misconduct.

The first genuine class of situations in which liability is imposed may be dominated "non-delegable duties". Where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such person cannot escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor.³⁵ The duty may be imposed by statute or municipal ordinance

29. 27 Am. Jur. 507; Note: 66 L. R. A. 942; 14 R. C. L. 80.

30. *Ibid*; Note: 30 A. L. R. 1539 *et seq*; RESTATEMENT, TORTS, § 411 (1934) — See Comment (a) for "meaning of a competent contractor."

31. See note 26, *supra* § 412.

32. II MECHAM, AGENCY, § 1920 (2nd Ed. 1914); Note: 31A L. R. A. 1029.

33. 27 Am. Jur. 510; Notes: 30 A. L. R. 1518; 66 L. R. A. 950.

34. Note: 30 A. L. R. 1535; C. J. S. 370.

35. HARPER, TORTS, § 292 (1933); RESTATEMENT, TORTS, §§ 287-296 (1934); Note: 23 A. L. R. 984 *et seq*.

which prescribes or requires certain precautions or certain acts. However, a violation of the statute or ordinance must be shown to be the proximate cause of the injury complained of.³⁶ Similarly, duties may be imposed upon those persons doing work under licenses, franchises or corporate charters.³⁷ Many of the cases under these last two situations involve duties imposed on railroads to perform affirmative duties toward invitees and others to whom the occupier is bound to keep his premises in a reasonably safe condition.³⁸ Application of this principle is also frequently found in cases where municipalities have contracted with others to keep their streets and highways or other public places in repair.³⁹ There is a non-delegable duty in respect to work which will, in the natural course of events, produce injury unless certain precautions are taken.⁴⁰ This exception does not embrace work which if properly done will occasion no injuries but rather work in which there is danger in the mere performance of it apart from any negligence by the independent contractor or his servants, which may generally be executed with safety if certain precautions are adopted.⁴¹ The non-delegable duty in respect to work inherently or intrinsically dangerous seems to be a mere broadening of the foregoing and they could well be classified together. It is not essential that injuries to third persons must necessarily follow from the doing of the work; it is sufficient if the work be so inherently dangerous that injuries will probably be occasioned unless proper precautions are taken.⁴² Also, if the work is inherently dangerous, it is not necessary to show that the particular injury was foreseen or authorized.⁴³ This exception is very broad and space does not permit reference to the numerous, specific cases in which work is viewed as inherently dangerous and the many tests prescribed. (Suffice it to say that the danger must be substantial and recognizable.)⁴⁴ Another non-delegable duty arises in situations where injury will result not from the manner of doing the work, but from the doing of it at all. That is, the

36. Notes: 23 A. L. R. 989; 115 A. L. R. 979.

37. 57 C. J. S. 368.

38. RESTATEMENT, TORTS, § 292 (1934).

39. Note: 23 A. L. R. 1008; RESTATEMENT, TORTS § 288 (1934).

40. Notes: 21 A. L. R. 1230; 23 A. L. R. 1016; 76 A. L. R. 1257; 14 R. C. L. 86.

41. 57 C. J. S. 361.

42. Notes: 14 R. C. L. 87; 23 A. L. R. 1095.

43. Notes: 65 L. R. A. 837; 23 A. L. R. 1090; 14 R. C. L. 87.

44. 57 C. J. S. 590.

employer is answerable for injuries which necessarily follow the performance of the work and which are not the result of the collateral negligence of the contractor.⁴⁵ Therefore, where the act contracted for is illegal or wrong in itself, the fact that it is performed by an independent contractor will not save the employer from liability to a person injured by that act.⁴⁶ Similarly, where the act contracted for will necessarily result in a trespass upon the right or property of another, the employer is answerable.⁴⁷ By the same token, where the act contracted for will necessarily result in a nuisance, the employer cannot escape liability by employing an independent contractor.⁴⁸ The theory upon which these last three exceptions is based seems to be that it would be against public policy to absolve from liability one who directs the commission of an illegal act, trespass or nuisance. These seem to be the main exceptions to the general rule of non-liability on the part of the employer of an independent contractor and a resort to the authorities will reveal many others less significant or bordering on those mentioned. Even before examining the cases and from the mere reading of this brief discussion, the following statement may well be true:

A number of factors concur to constitute . . . such a powerful argument for the liability of the employer of an independent contractor that it would seem highly desirable for the courts to adopt the rule of liability and confine non-liability to a few exceptional cases.⁴⁹

CONTRACTS BY THE INDEPENDENT CONTRACTOR

The general rule is that the employer is not liable to third persons for contracts entered into with an independent contractor.⁵⁰ Thus we see that the general rule of non-liability of the employer for the torts of an independent contractor is equally applicable, if not more so, for the contracts of the independent contractor. Perhaps the reasoning is that:

The contract case would seem to be much weaker, not only because the third person has an opportunity, usually

45. Note: 14 R. C. L. 86; HARPER, TORTS, § 292 (1933).

46. Notes: 65 L. R. A. 746; 76 A. L. R. 1258.

47. Notes: 21 A. L. R. 1261; 76 A. L. R. 1258; 14 R. C. L. 89.

48. See note 47, *supra*.

49. HARPER, TORTS, § 292 (1933).

50. MECHEM, AGENCY, § 40 (1914).

denied the tort creditor, to ascertain with whom he is dealing, but since his loss is a pecuniary one, there are not the same social values demanding recognition as in the personal injury cases.⁵¹

Of course, the same criteria or factors previously discussed are employed to determine whether one is an independent contractor or whether the action be one of tort or contract and once again the vital factor is the extent of control held by the employer. Perhaps it is not strictly true to say that there are exceptions to this rule for we are dealing within the twilight zone between an agent and an independent contractor and as we have seen previously, the term "agent", "servant", and "independent contractor" are not infrequently used interchangeably as the situation requires.⁵² However, if an employer induces another, by his act or conduct, to believe that the employee is only a servant, then he is estopped from asserting that he is an independent contractor,⁵³ but a mere belief not induced by the employer that one is a servant is not sufficient to create an estoppel.⁵⁴ Thus we have a situation bordering on agency by estoppel for it is necessary to resort to terms of apparent authority, ratification, etc. From the cases it seems that, as a general observation, one who is hired to accomplish physical results and enters into contracts incidental to the result is more prone to be looked on as an independent contractor while one who is hired to make contracts, as a salesman, broker, factor, etc., is more likely to be looked on as an agent and liability ensues.

THE LAW AS DEVELOPED IN SOUTH CAROLINA

A broad and general picture of the law of independent contractors has been painted and the main purpose of this article has been reached; that is, the status of the independent contractor in South Carolina and the governing principles laid down by our courts. The reader need not expect glaring and startling changes and differences in the South Carolina law for as it has been observed:

51. See note 6, *supra* at 513.

52. See note 3, *supra*; see note 4, *supra*.

53. Notes: 20 A. L. R. 807; 19 ANN. CAS. 6

54. *Id.*

The difficulty is not so much with the law, which is certain enough, as it is with its application to particular cases . . .⁵⁵

However, it should prove beneficial to examine the law in South Carolina, the factors which are considered in determining the cases and since a review of each decided case is impossible, because of limitations of space, the writer will *attempt* to cite all the cases in which the law of independent contractors is considered.

At the outset we are confronted with the age old problem of exactly who is an independent contractor. One of the best definitions is found in *Chatman v. Johnny J. Jones Exposition, Inc.*,⁵⁶ which states:

Where the will of the employer is represented only in the result, and not in the means by which it is accomplished, and the employer retains no control over the employee as to the manner of means of accomplishing the desired result, the employee is an independent contractor and he, and not his employer, is responsible for his own acts and conduct, and the relation is not changed by the employer's reservation of the right of supervision and approval.

It is a matter of considerable difficulty to differentiate between an agent and an independent contractor. Even though there is a written contract of employment, one must carefully consider its terms for although a contract is artfully drawn so as to relieve one of liabilities which accompany agency relationships and is complete with a declaration that there is no contract of agency between the parties, the courts will look behind this and if a proper construction of its terms shows the relationship of principal and agent, it will so hold regardless of what names the parties call themselves.⁵⁷

An employer cannot escape the consequences of the employer-employee relationship by calling his foremen independent contractors, by giving them the right to hire

55. See Note 6, *supra* at 502.

56. 212 S. C. 215, 47 S. E. 302 (1948) — Citing 2 C. J. S. 1027; 2 Am. Jur. 17; 27 Am. Jur. 481-488.

57. *Tate v. Claussen-Lawrence Construction Company*, 168 S. C. 481, 167 S. E. 826 (1931); *McNeil v. Elective Storage Battery Co.*, 109 S. C. 326, 327, 96 S. E. 134, 135 (1917).

and fire those working under them or by paying them on a piecework basis.⁵⁸

It has also been recognized in South Carolina, in line with the authorities generally, that notwithstanding the written contract between the parties, other relationships may arise between them growing out of their course of dealings; so that an employer may be an independent contractor as to certain work yet be a mere servant as to other work for the same employer.⁵⁹ Therefore it is important to have some guides or factors to consider in ascertaining the employer-independent contractor relationship. There are many well recognized elements which should be considered. The later cases in South Carolina cite the approval and apply many of the tests laid down in the RESTATEMENT OF THE LAW OF AGENCY while recognizing that the presence of one or more is not necessarily conclusive.⁶⁰

The most important factor or element to be considered, as is evidenced by its inclusion in every definition of an independent contractor, is the extent of control exercised by the employer. This factor is given great consideration in all the South Carolina cases. In the first case concerning independent contractors in South Carolina, *Conlin v. City Council of Charleston*⁶¹ (of historical interest because it contains the story of the first attempt after the Confederate War to replace the bell in the tower of St. Michael's Church, Charleston, resulting in the tragedy which gave rise to the litigation), the underlying basis for the factor of control was expressed in the following manner:

A master is liable for the negligence of his servant engaged in his business, because he selects his servant and controls him. He should not be answerable for acts done

58. *Lunder Mutual Casualty Insurance Co. v. Stukes*, 164 F. 2d 571 (4th Cir. 1947).

59. *Tate v. Claussen-Lawrence Construction Company*, Note 57, *supra* — citing 14 R. C. L. 676; *Googe v. Speaks*, 194 S. C. 218, 9 S. E. 2d 439 (1939).

60. See note 7, *supra*; *Norris v. Bryant*, 217 S. C. 389, 60 S. E. 2d 344 (1950); *Allison v. Ideal Laundry*, 215 S. C. 344, 55 S. E. 2d 28 (1949); *Chatman v. Johnny J. Jones Exposition, Inc.*, 212 S. C. 215, 47 S. E. 2d 302 (1948).

61. 15 RICH. 201 (1867 — Criticized in 29 A. L. R. 736 at 755 on the grounds that the language used by Justice Wardlaw seemed to imply that the master was responsible for dangers created in the place of work by the negligence of a contractor.

by the servant of another or by that other who is not subject to his control.

The *Conlin Case* also held that to make a person an independent contractor, it is essential that he have such control of the place as is convenient for doing the undertaker's work, and for such time as the performance of the work required; but, that rights of others, not inconsistent with this control, can subsist along with it. In *Rogers v. Railroad Company*,⁶² it was held that the reserved control, which is necessary to make one an agent rather than an independent contractor, must be both general and special, not only as to what work shall be done, but also how it shall be done. That is, the mere fact that one of the parties has the power to give general directions as to what is to be done without control over the methods or means of operation or that the parties have agreed to specified rules does not necessarily create a principal-agent relationship.⁶³ Similarly, the retention of general supervision which relates to the result is not conclusive.⁶⁴

Another factor to be considered is the kind of business or work the person employed is engaged in. Thus in the *Chatman Case*,⁶⁵ in holding the owner of a minstrel show to be an independent contractor, the court considered that this was a separate and individual business which was created and developed into a completed unit before the contract with the defendant company. Closely allied with this factor is a consideration of the skill which is necessary to perform the work contracted for. Thus in two late cases, the court considered the skill incident to the operation of a minstrel show⁶⁶ and the skill required in the hauling of logs by a truck.⁶⁷ In *Norris v. Bryant*,⁶⁸ the fact that the person employed operated a filling station and that the hauling of logs was not a part of his regular business was also considered.

Another important factor to be borne in mind is the consideration of who supplies the tools and material to be used in the work and who supplies the workmen to do the work. Thus

62. 31 S. C. 578, 9 S. E. 1059 (1889) — Cited in 19 A. L. R. 245.

63. See *Chatman v. Johnny J. Jones Exp. Co.*, note 60, *supra*, *Norris v. Bryant*, note 60, *supra*.

64. *Ibid.*

65. See note 56, *supra* at 220, 221.

66. *Ibid.*

67. *Norris v. Bryant*, note 60, *supra* at 404.

68. *Ibid.*

in *Tate v. Claussen-Lawrence Construction Company*,⁶⁹ it was considered strong evidence of an agency relationship that a gasoline truck driver used the implements and utensils of the refining company rather than his own in the conduct of his business. On the other hand, it is strong evidence that one is an independent contractor if he furnishes his own implements and utensils.⁷⁰ As to whose workmen are used, it was said in the *Rogers Case*:

The point is, who is doing the work? Is the company doing it by its employees, or is the contractor by his?⁷¹

The question of who selects and pays the personnel is considered as well as the questions of which party may discharge such personnel and which party has control of the contractor's servants.⁷²

The method of payment to the contracting party is also of some significance to be considered along with all the other circumstances. Thus in the *Norris Case*⁷³ it was held that the fact that a person was to furnish a truck and driver and haul logs at a certain rate per thousand feet was some evidence of the relation of independent contractor but the fact that he was to be paid by the quantity, rather than by the day or hour was not conclusive of that relationship.

Also in the *Norris Case* it was observed that although one is to carry public liability insurance on his vehicles and workmen's compensation insurance on all of his employees, an insurance requirement of this nature in itself is not sufficient to change the quality of a contract which otherwise clearly establishes the relation of independent contractors.⁷⁴

Many other factors are mentioned in passing and many doubtlessly borne in mind by the court without being expressed. The most significant have been noted here from the South Carolina cases and for a fuller discussion, the reader is referred to the previous discussion and the authorities cited therein.

69. See note 57, *supra* at 489; *Gomillion v. Forsythe*, 218 S. C. 211, 62 S. E. 2d 297 (1950).

70. See note 63, *supra*.

71. See note 62, *supra* at 386.

72. See note 61, *supra* at 211; see note 62, *supra* at 384; *Banks v. Ex-supra* at 229.

73. See note 67, *supra* at 404-405.

74. See note 60, *supra* at 399 — citing 85 A. L. R. 784.

TORT LIABILITY OF THE EMPLOYER

The great majority of the cases in South Carolina involving independent contractors have arisen out of tort, as have most cases elsewhere, and therefore it is necessary to review the law in this field at some length. As to the liability of the employer for the torts of an independent contractor, South Carolina adheres to the same general rule which prevails elsewhere; namely, that one for whose benefit work is being done, is not held answerable for the negligence of an independent contractor to whom he has committed the work to be done without his control.⁷⁵ South Carolina has not had cases arising under all of the exceptions mentioned previously but has had some and they have conformed generally to the exceptions mentioned.

The first exception was laid down in the *Conlin Case* which observed that under suitable allegations, the employer might be made responsible for the misconduct or negligence of a contractor known to be unworthy of trust, to whom a work involving danger to others is entrusted.⁷⁶ This exception is based on the personal fault of the employer rather than on the fault of the independent contractor. Another exception founded on that basis is that the employer is liable if he ratifies the tortious acts of the contractor or by his own act participates or receives the benefit of the tortious acts. Liability is not imposed by the relationship but upon the act of the employer himself. Thus in *Abbott v. Sumter Lumber Company*,⁷⁷ where a person employed by the defendant cut timber upon the land of another and the employer received the timber from him, it was held that whether an independent contractor or not, the defendant was liable because by his own act he had ratified the contractor's acts and received the benefits therefrom. In a similar case, where a contractor wrongfully cut timber from the lands of another and the employer used that timber, the court held that the employer was liable due to his own act of converting the lumber to his own use and

75. See note 61, *supra* at 211; see note 62, *supra* at 384; *Banks v. Express Co.*, 73 S. C. 211, 63 S. E. 166 (1906); *Caldwell v. Carroll*, 139 S. C. 163, 137 S. E. 444 (1925) — See dissenting opinion by Justice Cothran that Carroll was an independent contractor.

76. See note 61, *supra* at 211.

77. 93 S. C. 131, 76 S. C. 146 (1912).

it was not necessary that he should ratify the acts of the contractor.⁷⁸

The next type of exceptions to be considered delve into the realm of "non-delegable duties." The first type of duties to be considered are those which are imposed upon the employer by statutes and ordinances or by franchises or charters. In the *Rogers Case*, in which it was held that a railroad company was not liable under the "fire statute"⁷⁹ for damages resulting from a fire within the limits of its right-of-way, caused by acts of the servants of an independent contractor engaged by the company to build the road, the court considered the principle that where certain obligations exist, growing out of the privileges and franchises granted to the corporation, which would be inconsistent with the right of the company to employ an independent contractor to meet such obligations, the corporation cannot shift the responsibility to the contractor, but the court remarked that no obligation of the defendant had been pointed out inconsistent with having its road graded by an independent contractor.⁸⁰ It was observed by Justice McIver, in perhaps the leading case in this state on this point, although not involving an independent contractor:

When a railroad or *other corporation* receives its charter from the State, conferring certain franchises, rights and privileges, it is upon the consideration that such corporation shall perform the duties and fulfill the obligations which it at the same time incurs. The fact that the corporation chooses to perform these duties and fulfill its obligations to the community through another, whether a *lessee or otherwise*, cannot release it from the obligation which it has assumed by the acceptance of its charter.⁸¹

Thus it has been held that the privilege granted to railroad corporations to cross public highways is such a duty or obligation which cannot be delegated through the operation of the railroad by the independent contractor or a lessee.⁸² Also,

78. *Crosland v. Graham*, 83 S. C. 228, 65 S. E. 233 (1908).

79. S. C. CODE § 8362 (1942) — Provides for liability on the part of a railroad Corporation (without regard to negligence) for fires started by its locomotive engines or originating within the limits of its right of way by the acts of its authorized agents or employees.

80. See note 62, *supra* at 387.

81. *National Bank v. Railway Company*, 25 S. C. 216 (1885).

82. *Engelberg v. J. F. Prettyman and Sons*, 159 S. C. 91, 156 S. E. 173 (1930)

that the duty upon a municipal corporation to keep its streets safe for the use of those entitled thereto is such a duty which may not be delegated to an independent contractor so as to relieve such corporation from liability for injuries which are caused by defects or other unsafe conditions in its streets.⁸³ One logical basis for the rule seems to be that the corporation cannot be permitted to enjoy the benefits conferred by its charter without incurring the responsibilities incident thereto.⁸⁴ A corporation has no implied authority to delegate or relinquish its public duties to another and cannot do so without statutory authority and escape liability.⁸⁵

Another well established exception, sometimes classed as a separate exception and sometimes under the "non-delegable duty" exception, is that the employer is liable for acts of negligence of his independent contractor where the work is inherently or intrinsically dangerous to others. This exception was seemingly first recognized in the *Conlin Case* in which the following language appears:

If the work involves the creation of a nuisance, owner and contractor become joint wrongdoers, and neither or both must answer for the consequences.⁸⁶

Although not couched in terms of "inherent" or "intrinsic" danger, it was correctly pointed out in a recent case that the word "nuisance" as used therein was used to connote a condition of danger to others, temporarily, pending completion of the work.⁸⁷ In *Allison v. Ideal Laundry*,⁸⁸ which involved a disastrous explosion of a laundry due to a faulty propane gas system recently installed, it was held that the employer of an independent contractor, who installed the system was not liable for the contractor's negligence. The reasoning used was that even if a propane gas system is inherently dangerous, the liability of the employer depends upon his antecedent knowledge of the danger inherent in the work or a finding that the average reasonably prudent man or corporation

83. *Walsh v. Dawson Engineering Co.*, 159 S. C. 425, 157 S. E. 447 (1931); see also S. C. CODE § 7345 (1942) which confers a cause of action for damages caused by defects in the street, mismanagement, etc.

84. *Harmon v. Railroad Company*, 28 S. C. 401, 5 S. E. 835 (1887).

85. *Smalley v. Railway*, 73 S. C. 572, 53 S. C. 1000 (1905); *Hart v. Railroad Co.*, 33 S. C. 427, 12 S. E. 9 (1889); *Harbert v. Air Line Railway*, 74 S. C. 13, 53 S. E. 1001 (1906).

86. See note 57, *supra*, at 211.

87. *Allison v. Ideal Laundry*, 215 S. C. 344, 55 S. E. 2d 28 (1949).

88. *Ibid* at 350.

should, in the exercise of due diligence, have known; and that in the instant case no inherently dangerous nature had been found by the employer after a diligent investigation.⁸⁹ In a late case in which this exception was attempted to be invoked in regard to an injury caused by a logging truck, it was asserted that although a truck negligently operated on the highway is a dangerous instrumentality, the court was not ready or willing to hold that the hauling of logs by a truck is so inherently dangerous as to make the owner liable for the negligence of an independent contractor.⁹⁰

Many of the well established exceptions mentioned in the previous general discussion have not had occasion to be involved or have been overlooked, but there is no reason to believe that South Carolina would not follow the law that is uniformly established elsewhere.

CONTRACT LIABILITY OF THE EMPLOYER

The only case involving an action on a contract in which the employer seeks to avoid liability on the grounds that the contracting party was an independent contractor is *Chatman v. Johnny J. Jones Exp., Inc.*⁹¹ There it was asserted that:

Where the will of the employer is represented only in the result, and not in the means by which it is accomplished, and the employer retains no control over the employee as to the manner or means of accomplishing the desired result, the employee is an independent contractor, and he, not his employer, is responsible for *his own acts and contracts* . . .⁹²

The court held that the relationship of employer-independent contractor, rather than principal-agent, existed between them and the employer was exempted from liability. In contract cases as well as in tort cases the general rule of non-liability on the part of the employer applies and the same elements and factors are considered in determining the relationship in both.

89. *Id* at 351.

90. See *Norris v. Bryant*, note 60, *supra*.

91. See note 56, *supra*.

92. *Ibid* at 219.

THE INDEPENDENT CONTRACTOR UNDER THE WORKMEN'S
COMPENSATION ACT

Ordinarily, at common law, the contractee is not liable for injuries sustained by the employees of an independent contractor.⁹³ The following discussion is concerned with the problem of whether or not the independent contractor and/or his employees are within the coverage of the Workmen's Compensation Act.

The pertinent section of the Act is:

Sec. 7035-22 (A) *Rights of Employees of Subcontractors*
—*Rights and Liability of Contractor and Sub-Contractors*

(a) Where any person (in this section referred to as "owner"), undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay any workman employed in the work any compensation under this article which he would have been liable to pay if the workman had been immediately employed by him.

Where any person (in this section referred to as "contractor") contracts to perform or execute any work for another person, which work or undertaking is not a part of the trade, business or occupation of such other person and contracts with any other person (in this section referred to as "subcontractor") for the execution or performance by or under the subcontractor of the whole or any of the work undertaken by such contractor, then the contractor shall be liable to pay any workman employed in the work any compensation under this article which he would have been liable to pay if that workman had been immediately employed by him.

The settled law in this state is that the basic purpose of the Act is the inclusion of employers and employees and not their exclusion; and that its presumptions and its penalties are directed toward the end of effecting coverage rather than

93. 57 C. J. S. 371.

non-coverage.⁹⁴ However, the courts are without authority to enlarge the meaning of the terms used by the legislature or to extend by construction its scope and intent so as to include persons not embraced by its terms; and one who seeks to avail himself of the Act must show that he is within the terms of the Act.⁹⁵

With this basic rule of construction in mind, let us look to the meaning which has been given to Section 7035-22 (A). There is no holding in direct and unequivocal language that the employee of the independent contractor as such (*i.e.* as defined at common law⁹⁶) is not within the coverage of the Act but there is dicta to that effect.⁹⁷ Then, too, the very wording of the second paragraph of Section 7035-22 (A) seems to indicate that the "contractor" (referring to the common law independent contractor) himself is liable for compensation to the "subcontractor's" workmen rather than the contractee (referring to the common law employer) where the work contracted for is not a part of the trade, business or occupation of the contractee. However, under the first paragraph of Section 7035-22 (A), if his employees are performing or executing a part of the trade, business or occupation of the "owner", it seems that one who would ordinarily be an independent contractor assumes the role of a "subcontractor", within the meaning of the Act, and the employees of such "subcontractor" are covered by the Act. (The word "owner" as used in Section 7035-22 (A) has been interpreted to be synonymous with principal contractor; that is, the person who is having the work done.⁹⁸) Thus we see that liability is not dependent upon the contractual relationship of the employees to the owner or contractee but is predicated on whether or not the employees of the "subcontractor" are performing a part of the trade, business or occupation of the owner or contractee.⁹⁹ In fact, the real reason for the enactment of

94. *Kennerly v. Ocmulgee Lumber Co.*, 206 S. C. 481, 34 S. E. 2d 792 (1945); *Rudd v. Fairforest Finishing Co.*, 189 S. C. 188, 200 S. E. 727 (1939); *Hopkins v. Darlington Veneer Co.*, 208 S. C. 307, 38 S. E. 2d 4 (1946).

95. *McDowell v. Stilley Plywood Co.*, 210 S. C. 173, 41 S. E. 2d 872 (1947).

96. See note 1, *supra*.

97. *Miles v. W. Va. Pulp & Paper Co.*, 212 S. C. 424, 436, 48 S. E. 2d 26, 32 (1948); *Marshbanks v. Duke Power Co.*, 190 S. C. 336, 364, 2 S. E. 2d 825, 837 (1939).

98. *Marshbanks v. Duke Power Co.*, note 97, *supra* at 362.

99. *Hopkins v. Darlington Veneer Co.*, note 94, *supra* at 311; *Kennerly v. Ocmulgee Lumber Co.*, note 94, *supra* at 488.

this section was evidently a realization on the part of the Legislature that it would not be fair to relieve the owner of compensation to employees doing work which was a part of his trade or business by permitting the owner to sub-let or sub-contract some part of the work, for in many instances a subcontractor would be financially irresponsible or the number of employees under him would be so small that the subcontractor would fall within the exemption afforded all employers of less than fifteen persons.¹⁰⁰

Therefore a discussion of what is and what is not "a part of the general trade, business or occupation of the owner" is necessitated. The fact that the work is of an unusual nature or requires special skill plays no part in deciding whether or not a particular accident comes under the Act.¹⁰¹ Nor does the fact that a commodity is essential and necessary in the operation of a business.¹⁰² One suggested test is: was the employee doing something for the subcontractor which bore some reasonably direct relation to the performance of the work undertaken by the contractor?¹⁰³ Thus, in the *Marshbanks Case*, an employee of one employed by a power company to paint the company's poles was engaged in the trade or business of the power company since maintenance of transmission lines is an important part of that business.¹⁰⁴ It has been held that the painting of a water tank was such a part of a cotton mill's "trade, business or occupation" as to constitute the contractor a "subcontractor", within the meaning of Section 7035-22 (A), since a water tank is an integral part of a cotton mill for protection against fire. The mill was held liable for compensation for the death of a workman employed by the contractor to do the painting when the tank exploded.¹⁰⁵ It was held in a case where an employee of a garage was injured by the explosion of the engine of defendant's bus which the garage had been called upon to repair in an emergency, that such repairs were a part of the trade, business or occupation of the bus company, even though the company had regular shops for the repair of its buses.¹⁰⁶ A truck driver for a "subcontractor",

100. *Marshbanks v. Duke Power Co.*, note 97, *supra*.

101. *Ibid* at 366, *Bozeman v. Pacific Mills*, 193 S. C. 479, 8 S. E. 2d 878; *Berry v. Atlantic Greyhound Lines*, 114 F 2d 255 (4th Cir. 1940).

102. *Miles v. W. Va. Pulp & Paper Co.*, note 97, *supra*.

103. *Smith v. Fulmer*, 198 S. C. 91, 15 S. E. 2d 681 (1941).

104. *Marshbanks v. Duke Power Co.*, note 97, *supra*.

105. *Bozeman v. Pacific Mills*, note 101, *supra*.

106. *Berry v. Atlantic Greyhound Lines*, note 101, *supra*.

injured while delivering wood blocks to a veneer company from its timberlands pursuant to a contract between the company and the "subcontractor", was held to be performing or executing work which was part of the trade, business or occupation of the company.¹⁰⁷ In the *Kennerly Case*,¹⁰⁸ the following language was quoted with approval:

Various sorts of work carried on by independent contractors or subcontractors for principal employers engaged in lumbering or related occupations have been held to be so related to the trade or business of the principal employer as to charge him with liability for the compensation of injured employees of the contractor.

Well diggers injured by a dynamite explosion while employed by a cotton mill in deepening a water well on a farm rented by the mill to a sharecropper were held not to be engaged in the course of the business of the mill.¹⁰⁹ By way of illustration in the *Marshbanks Case*, the court said that if a merchant wished to construct an apartment house, it would not be a part of the trade or business of the owner.¹¹⁰ A gasoline filling station attendant, while assisting the driver of a stalled bus by pouring gas into the carburetor suffered severe burns when the motor backfired, and was held to be a mere "casual" employee and therefore excluded by the Act.¹¹¹ Thus we see that the phrase "a part of the general trade, business or occupation" is generally construed with a view to inclusion rather than exclusion.

An interesting problem is presented by an analysis of Sections 7035-2 (B) and 7035-16 (B) in regard to "casual" employees. ("It is well settled that an employment is not casual when a person is employed to do a particular service or class of service, recurring somewhat regularly and with a fair expectation of continuance for a reasonable period."¹¹²) Section 7035-2 (B) provides as follows:

107. *Hopkins v. Darlington Veneer Co.*, note 94, *supra*.

108. *Kennerly v. Ocmulgee Lumber Co.*, note 94, *supra* at 490 — Citing an annotation in 150 A. L. R. 1251.

109. *Patterson v. Courtney Mfg. Co.*, 196 S. C. 515, 14 S. E. 2d 16 (1940).

110. *Marshbanks v. Duke Power Co.*, note 97, *supra* at 344.

111. *Jolly v. Atlantic Greyhound Co.*, 207 S. C. 1, 35 S. E. 2d 42 (1945) — Compare with *Berry v. Atlantic Grayhound Co.*, note 103, *supra*.

112. *Ward v. Ocean Forest Club, Inc.*, 188 S. C. 233, 198 S. E. 385 (1937) — Quoting an annotation, 60 A. L. R. 1197.

Section 7035-2 (B)—The term “employee” means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens; and also including minors, whether lawfully or unlawfully employed, but excluding persons whose employment is *both casual and not in the course of the trade, business profession or occupation of his employer*.

Section 7035-16 (B)—*This article shall not apply to casual employees, farm laborers . . .*

Thus we see that 7035-2 (B) excludes as casuals only those not so employed in the course of trade, business, etc., of his employer; whereas 7035-16 (B) excludes all casuals. This apparent conflict was mentioned in the *Ward Case*,¹¹³ as a discrepancy but was circumvented since the court felt that the employee there was clearly not “casual”. The *Berry Case*,¹¹⁴ relying heavily upon a North Carolina decision,¹¹⁵ held that “casual” as used in § 7035-16 (B) should be construed in the light of the definition of “employee” in § 7035-2 (B) and also in the light of the broad provisions of § 7035-22 (A). Thus it would be possible for one who is a “casual” employee to be extended coverage by the Act if he was engaged in the course of the trade, business, profession or occupation of his employer. However, in the *Jolly Case*,¹¹⁶ the court disagreed with this reasoning. In this case the court decided that § 7035-16 (B) prevailed and that all casual employees are excluded by reason of the “last legislative expression rule”; that is, a subsequent provision of a statute should prevail over a prior one, the later being the last in point of time or order of arrangement.¹¹⁷ Therefore, as the law stands today, a “casual” employee is not within the coverage of the Act whether engaged in the course of the trade, business, profession or occupation of his employer or not. In the *McDowell Case*, it was held:

The wording of the applicable section of the Workmen’s Compensation Act in this state (Sec. 7035-22 (A)), it

113. *Ibid* at 240.

114. *Berry v. Atlantic Greyhound Co.*, note 101, *supra* at 258.

115. *Johnson v. Asheville Hosiery Co.*, 199 N. C. 38, 153 S. E. 591 (1930).

116. *Jolly v. Atlantic Greyhound Co.*, see note 111, *supra* at 11.

117. *Ibid* at 8 — Citing *Feldman v. Tax Commission*, 203 S. C. 49, 26 S. E. 2d 22 (1943).

seems to us, clearly evinces an intention on the part of the Legislature not to include therein a subcontractor or independent contractor, but only workmen or employees of either the "owner" or the "subcontractor."¹¹⁸

It is to be noted that this language excludes the claim of the "subcontractor" *personally* and only those who can qualify as workmen or employees of the "owner" or "subcontractor" are afforded the coverage of the Act.

A very important point to be noted is that if the facts bring the case within the terms of the Act, the employee is restricted to his right of claim for compensation under the Act, and cannot bring an action at common law. As was observed in the *Marshbanks Case*:¹¹⁹

The right of workmen's compensation is wholly statutory, not existing except under the circumstances provided in the Workmen's Compensation Act. It is not a common law right for the reason that the Acts are in derogation of, or departure from, the common law, and are not amendatory, cumulative, or supplemental thereto, nor declaratory thereof, but wholly substitutional in character.

PROCEDURAL MATTERS

Since the establishing of the relationship of employer-independent contractor depends largely upon the presentation of the facts and since the relationship is often so difficult to distinguish as well as to establish, it is important to know upon whom the burden of proof rests. The general rule is that one who seeks to shield himself from liability by the plea of independent contractor should have the burden of proving all the facts that make him, who would otherwise be a mere servant or agent, an independent contractor.¹²⁰ In the *Norris Case*,¹²¹ the court recognized that it is generally held that where a plaintiff makes out a *prima facie* case of master and servant, and the defendant claims he is not liable because the work was being done by an independent contractor, the bur-

118. See note 95, *supra* at 183.

119. *Marshbanks v. Duke Power Co.*, note 97, *supra* at 363 — Quoting from 71 C. J. 229-231.

120. See note 77, *supra* at 147.

121. See note 60, *supra* at 403 — Citing 27 Am. Jur. 538; C. J. S. 396; *Embler v. Gloucester Lumber Co.*, 167 N. C. 457, 83 S. E. 740 (1914).

den is upon him to prove such a relationship. However, the court did not undertake to determine the correctness of this rule but did assert that at least the burden of going forward with the evidence on the issue of independent contractor shifts to the defendant.

As a general rule, no presumption exists that an employee is either a servant or an independent contractor.¹²² However, where one is found in possession of the property of another, using it in the service of such other, he is presumed to be the servant of the owner and this presumption follows throughout the entire case and requires rebuttal evidence.¹²³ Therefore, the employer who has intrusted his property to the person for whose acts he is sued, has an additional hurdle to overcome.

It is generally held, where the question whether an employee is an independent contractor or a mere servant depends upon the construction of an unambiguous written instrument, that the question is one of law for the court to decide.¹²⁴ However, even where there is a written contract fixing the relationship of employer and independent contractor, if there is evidence of other contracts and connections between the parties tending to create the relationship of principal and agent, it is a question of fact for the jury.¹²⁵ Where there is no written contract and the relationship of employer and independent contractor is sought to be established by the testimony of the parties and their witnesses, it is error to direct a verdict on the grounds that a person was an independent contractor if the testimony is subject to more than one reasonable inference.¹²⁶ It would be safe to say that in the great majority of the cases, through conflicting testimony and evidence, the question of whether or not one is an independent contractor is one for the jury under proper instructions from the court.

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123. *Burbage v. Curry*, 127 S. C. 349, 121 S. E. 267 (1923); *wavis v. Littlefield*, 97 S. C. 171, 81 S. E. 487 (1913); *Osteen v. Oil Co.*, 102 S. C. 146, 86 S. E. 202 (1915); and numerous other cases.

124. See note 62, *supra* at 384; *Sams v. Arthur*, 135 S. C. 123, 133 S. E. 205 (1924); *Googe v. Speaks*, note 59, *supra* at 215.

125. See note 57, *supra* at 486, 487.

126. *Norris v. Bryant*, note 60, *supra* at 404; see note 83, *supra* at 429; *McKinney v. Saluda Lumber Co.*, 126 S. C. 503, 120 S. E. 234 (1923); *Gomillion v. Forsythe*, note 69, *supra* at 233.

TELEGRAPH COMPANIES AS INDEPENDENT CONTRACTORS IN SOUTH CAROLINA

In South Carolina the sender of a message is not responsible for errors in the transmission of a message to the sendee for the telegraph company is not treated as the sender's agent but as an independent contractor. This view was adopted in *Eureka Cotton Mills v. Western Union Telegraph Co.*,¹²⁷ in which the court observed:

The courts of some states hold that the sender is bound by the terms of the message as delivered, and this view is based upon the theory that the telegraph company is the agent of the sender. Other authorities hold that the telegraph company is the agent of both sender and addressee; while the English rule, which has been adopted by other of our states, is that as between the sender and addressee the telegraph company is not to be considered as the agent of either party but as an independent contractor, a common carrier of intelligence for hire, and is liable in tort to either party, sender or addressee, for the breach of its public duty. We hold this to be the correct view...

This view was later affirmed by *Harper v. Western Union Telegraph Co.*,¹²⁸ and seems to be the correct one for neither the sender nor the addressee have any control over the transmission of a message. The telegraph is viewed as a type of public service and is under a duty to transmit a message correctly. A breach of that duty will render it liable to either the sender or the sendee.¹²⁹

CONCLUSION

Thus we see that for the most part, the status of the independent contractor in South Carolina is substantially the same as elsewhere. The law can be stated in broad and general terms but ultimately, each case must be decided on its own facts. A mastery or at least a good workable knowledge of this phase of the law is important as is evidenced by the

127. 88 S. C. 498, 70 S. E. 1040 (1911).

128. 133 S. C. 55, 130 S. E. 119 (1925) — For a full discussion of the problem see Note: *Contracts—Liability Resulting From Telegraphic Errors*, 3 S. C. LAW QUAR. 78 (1950).

129. See note 127, *supra* at 511; note 128, *supra* at 60.

number of decisions dealing with independent contractors which have been handed down since the passage of the Workmen's Compensation Act in 1935. Doubtlessly litigation under the Act will increase due to the trend of concentrating industry within one State. The problem of distinguishing the independent contractor from an employer is also important under other Acts not dealt with by this note such as the Social Security Act, the Fair Labor Standards Act, the Selective Service Act, and the Sherman Act, to mention a few. Over and above its relevance under these Acts, its importance still prevails in common law actions which fall within the broad field of agency. Therefore, it is hoped that this note will be of some assistance to the practitioner and to the student in his attempt to master the law of independent contractors.

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